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U.S. Citizenship
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FILE:

[REDACTED]

Office: NEBRASKA SERVICE CENTER

Date:

DEC 02 2005

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IN RE:

Petitioner:

Beneficiary:

[REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a CAE and customer software development company. It seeks to employ the beneficiary permanently in the United States as a project engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and denied the petition accordingly.

On appeal, counsel submits a brief and additional evidence.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor. See 8 C.F.R. § 204.5(d). Here, the Form ETA 750 was accepted for processing on February 28, 2002. The proffered wage as stated on the Form ETA 750 is \$71,365 annually. On the Form ETA 750B, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of July 2000.

On the petition, the petitioner claimed to have been established in 1997, listed a gross annual income of \$24,000,000, listed no net annual income and claimed to currently employ 80 workers. In support of the petition, the petitioner submitted its 2002 Form 1065 U.S. Return of Partnership Income, reviewed financial statements for 2002, bank statements, quarterly wage reports and financial statements for the first ten months of 2003.

Because the director deemed the evidence submitted insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date, on May 12, 2004, the director requested additional evidence pertinent to that ability. In accordance with 8 C.F.R. § 204.5(g)(2), the director specifically requested that the petitioner provide copies of annual reports, federal tax returns, or audited financial statements to demonstrate its continuing ability to pay the proffered wage beginning on the priority date and specifically for 2003.

In response, the petitioner resubmitted the first page of its tax return for 2002, a letter from its accountant asserting that its 2003 tax returns would not be complete for another three to four weeks and a pay statement for the beneficiary reflecting year to date wages of \$26,542 as of July 2, 2004.

The 2002 tax return reflects the following information:

Net income	(\$436,723)
Current Assets	\$3,903,872
Current Liabilities	\$4,868,034
Net current assets	(\$964,162)

The reviewed financial statements list the same current assets and current liabilities as listed above and reflect cash as of December 31, 2002 as \$990,385. The copies of the petitioner's checking account statements cover the period from December 2000 through September 2003.

In the final denial, the director noted that pay statement for the beneficiary did not reflect that the petitioner was paying the beneficiary the full proffered wage and determined that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel asserts that the petitioner "is currently employing the beneficiary and has been continuously paying him a rate which is at least the amount of the offered wage since mid-2004." Thus, counsel asserts that the "preponderance of the evidence suggests that the petitioner has the ability to pay the offered wage." The petitioner submits a copy of a May 4, 2004 Interoffice Memorandum from William Yates, Associate Director of Operations for Citizenship and Immigration Services (CIS), advising the service centers to review net income, net current assets and employment of the beneficiary. The petitioner also submits a February 16, 2005 Interoffice Memorandum from Mr. Yates reflecting that the proper standard is "preponderance of the evidence." Finally, the petitioner submits pay statements for the beneficiary from June 25, 2004 through April 1, 2005. The petitioner does not submit its 2003 tax return, despite advising the director in response to the request for additional evidence that it would be available in three or four weeks.

The unaudited financial statements that the petitioner submitted with the petition are not persuasive evidence, according to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage.

Any reliance on the balances in the petitioner's bank accounts is similarly misplaced. First, bank statements are not among the three types of evidence, enumerated in 8 C.F.R. § 204.5(g)(2), required to illustrate a petitioner's ability to pay a proffered wage. While this regulation allows additional material "in appropriate cases," the petitioner in this case has not demonstrated why the documentation specified at 8 C.F.R. § 204.5(g)(2) is inapplicable or otherwise paints an inaccurate financial picture of the petitioner. Second, bank statements show the amount in an account on a given date, and cannot show the sustainable ability to pay a proffered wage. Specifically, any wages expended to pay the proffered wage in one month would not be available in subsequent months. Third, no evidence was submitted to demonstrate that the funds reported on the petitioner's bank statements somehow reflect additional available funds that were not reflected on its tax return, such as the cash specified on Schedule L that will be considered below in determining the petitioner's net current assets.

As noted by counsel, the May 4, 2004 memorandum does permit CIS to look at employment of the beneficiary in considering a petitioner's ability to pay the proffered wage. The memorandum, however, specifically states that CIS will look at such evidence "[i]f the record is complete with respect to all of the required initial evidence." In this matter, the petitioner has not submitted the required initial evidence listed

in the regulation at 8 C.F.R. § 204.5(g)(2) for 2003 or 2004. Thus, we need not consider any wages actually paid in those years. Even if we were to consider such evidence, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2002 or 2003. The beneficiary's wages in 2002 and 2003 are unknown. The pay statements for the end of 2004 and early 2005 cannot establish the payment of wages prior to June 2004, and counsel does not assert that the petitioner was paying the proffered wage prior to mid-2004. Thus, the wage documentation submitted does not establish an ability to pay the proffered wage as of the priority date in 2002.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

Nevertheless, the petitioner's net income is not the only statistic that can be used to demonstrate a petitioner's ability to pay a proffered wage. If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. We reject, however, any argument that the petitioner's total assets should have been considered in the determination of the ability to pay the proffered wage. The petitioner's total assets include depreciable assets that the petitioner uses in its business. Those depreciable assets will not be converted to cash during the ordinary course of business and will not, therefore, become funds available to pay the proffered wage. Further, the petitioner's total assets must be balanced by the petitioner's liabilities. Otherwise, they cannot properly be considered in the determination of the petitioner's ability to pay the proffered wage. Rather, CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage.

Net current assets are the difference between the petitioner's current assets and current liabilities.¹ A corporation's year-end current assets are shown on Schedule L, lines 1(d) through 6(d). Its year-end current liabilities are shown on lines 16(d) through 18(d). If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage out of those net current assets.

¹ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

The petitioner has not demonstrated that it paid any wages to the beneficiary during 2002 or 2003 or that it paid the full proffered wage in 2004. In 2002, the petitioner shows a net loss and negative net current assets. The petitioner has not, therefore, demonstrated the ability to pay the proffered wage out of its net income or net current assets. The petitioner has not demonstrated that any other funds were available to pay the proffered wage. The petitioner has not, therefore, shown the ability to pay the proffered wage during 2002. The petitioner has not submitted tax returns, audited financial statements or annual reports for 2003 or 2004. Thus, we cannot determine whether the petitioner had the ability to pay the proffered wage in those years.

The petitioner failed to submit evidence sufficient to demonstrate that it had the ability to pay the proffered wage during 2002 or subsequently. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Moreover, while not raised by the director, we note that the petitioner has filed multiple immigrant petitions with similar priority dates. The petitioner must demonstrate an ability to pay each of the beneficiaries for whom it petitions. As the petitioner has not demonstrated an ability to pay the beneficiary of the petition before us, we cannot conclude that it has demonstrated its ability to pay multiple beneficiaries.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989) (noting that the AAO reviews appeals on a *de novo* basis). For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.